Seng Hock Heng Contractor Pte Ltd v Hup Seng Bee Construction Pte Ltd and Another [2002] SGHC 151

Case Number : Suit 484/2002, SIC 1447/2002, 1448/2002

Decision Date : 17 July 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Intekhab Khan, Dilip Kumar and Karen Quek (J Koh & Co) for the plaintiffs; Chong Kuan Keong and Lawrence Lim (Chong Chia & Lim LLC) for the first defendants

Parties : Seng Hock Heng Contractor Pte Ltd — Hup Seng Bee Construction Pte Ltd; Another

Banking – Performance bonds – Termination of sub-contract – First defendants calling upon performance bond – Application by plaintiffs for injunction against first defendants from receiving payment on bond – Onus of proof on plaintiffs to establish fraud or unconscionable conduct – Whether discharge of onus by plaintiffs – Whether to grant injunction

Judgment ***Cur Adv Vult***

GROUNDS OF DECISION

1. The first defendant is the main contractor to the Housing and Development Board's ("HDB") building project at Bukit Batok. The second defendant is an insurance company who is named nominally as a defendant because it had issued a performance bond in favour of the first defendant.

The bond was issued on behalf of the plaintiff who were the main sub-contractor to the first defendant in the HDB project at Bukit Batok. The project involved the building of three blocks of housing flats and surrounding supports such as car parks and playground.

2. The first defendant terminated its sub-contract with the plaintiff on 9 May 2002, and on 10 May 2002 it called upon the performance bond, which was for a sum of $1,295,000. The plaintiff had commenced proceedings against the first defendant for breach of contract, but in the applications before me in SIC 1447 and SIC 1448 of 2002 the plaintiff is seeking an injunction against the second defendant from making payment on the bond, and the first defendant from receiving payment on the bond.

3. The plaintiff's grounds for seeking an order restraining payment under the performance bond are based on unconscionability. First, it asserts that the first defendant wrongfully imposed liquidated damages on the plaintiff in March 2002. Secondly it assets that the first defendant had exaggerated its claim because only 4% of work remains uncompleted at the time the first defendant terminated its contract with the plaintiff. The plaintiff calculated the value of the 4% to be about $1,000,000 but the first defendant is claiming $3,400,000.

4. Mr. Dilip Kumar and Mr. Intekhab Khan appearing on behalf of the plaintiff submitted that the plaintiff's conduct is also oppressive because there is about $1,900,000 still in the first defendant's hands by way of a retention sum and also a sum of $239,000 due to the plaintiff by way of a final progress payment. Counsel referred me to the unreported case of *Raymond Construction Pte Ltd v Low Yang Tong* (Suit No. 1715 of 1995) for the proposition that the court may take an exaggeration such as that made by the first defendant into account. My attention was also drawn to *Sin Kian Contractor Pte Ltd v Lian Kok Hong* [1999] 3 SLR 732 for the proposition that even if the court is

minded to refuse an injunction it may order part payment only.

5. The principles submitted by counsel for the plaintiff were not challenged by Mr. Chong for the first defendant. His submission was based on a denial that the first defendant had exaggerated its claim. Mr. Kumar drew my attention to the plaintiff's progress claim for April 2002 and to the table he compiled which indicated the amount of work that is still incomplete and on that basis prays that the denial by the first defendant be rejected. Mr. Chong argued that the evidence relied upon by the plaintiff is incomplete and also not verified. He submitted that the plaintiff had not paid its own sub-contractors and, consequently, the first defendant may be compelled to employ a fresh contractor to complete the jobs. He argued that the first defendant had already given credit for the retention sum and all progress payments due. Both counsel filed a further written submission elaborating on the plaintiff's allegation that the first defendant had grossly exaggerated its claim. The plaintiff's submission is largely a regurgitation of what it's counsel, Mr. Khan, had presented before me. One of these points was that the first defendant had included the costs of its sub-contractors into its claim. Mr. Chong's response on behalf of the first defendant was that the sub-contractors' costs were a necessary cost occasioned by the plaintiff's breach. I accept his argument, for the time being, that the costs would not necessarily be the same costs as that of the plaintiff had it continued its role. I must stress that at this juncture, the onus of proof lay with the plaintiff. But it is not necessary nor reasonably possible for the court to embark on an evaluation of the evidence to see whether the costs were correctly and legitimately incurred. I think that I must act on reasonable evidence on the face of the documents produced without the benefit of a full inquiry. To do otherwise would be to embark on the inquiry into damages even before the trial has commenced.

6. The burden is on the plaintiff to convince the court that by reason of fraud or unconscionable conduct an injunction ought to issue against the first defendant. In this case, unlike the *Raymond Construction* case, the evidence before me is inconclusive and difficult to evaluate although, if pressed, my sympathy inclines towards the plaintiff. But it would not be right to grant an order on such basis for the court's sympathy based on inconclusive evidence may well be misplaced once all the evidence comes under the scrutiny of examination in open trial. Furthermore, there is no exceptional feature which may permit me to stray from the established principles that if the applicant fails to discharge the onus of proof his application must be dismissed.

7. Finally, for completeness, I should address some points raised by counsel. Mr. Kumar submitted that the plaintiff had themselves terminated its contract with the first defendant and commenced proceedings against it for breach of a condition precedent. His point was that under the contract between HDB and the first defendant, the latter was not entitled to assign the whole contract or appoint any sub-contractor without the written consent of HDB. The first defendant denies these allegations and made some counter assertions such as the claim that it was the plaintiff who encouraged or persuaded the first defendant to tender for the job with the HDB because the plaintiff did not have the requisite standing to submit its own tender. Mr. Chong denied that the first defendant had assigned the whole contract. In any event, the term was between the HDB and the first defendant. There was some evidence that the plaintiff had put the HDB on inquiry that no written consent was given but there was no satisfactory outcome from that avenue so it appears for the moment that HDB is not acting on its rights under its contract with the first defendant. The plaintiff's contract with the first defendant has no specific term mirroring the said written consent clause and it was thus obliged to rely on an implied term to sustain its suit against the first defendant. The facts will no doubt be strenuously disputed and this issue is not directly relevant nor important for my decision in respect of the application for an injunction.

8. For the reasons above, the plaintiff's application is dismissed. I shall hear the question of costs at a later date.

Sgd:

Choo Han Teck

Judicial Commissioner

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